IN THE SUPREME COURT OF MISSOURI
AT JEFFERSON CITY

STATE OF MISSOURI, ex rel. CHRISTINE DELF, Relator/Defendant, v. THE HONORABLE DARRELL E. MISSEY, Circuit Court Judge, Div. 2 Jefferson County Courthouse 300 Main Street Hillsboro, MO 63050 Respondent.	)	Sup. Ct. No. SC95800 Cause No. 14JE-CR03488-01

RELATOR CHRISTINE DELF'S REPLY BRIEF

Respectfully submitted,

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Unfortunately, the State has mischaracterized Petitioner's arguments, so Petitioner's Reply Brief will be devoted to clarifying exactly what those arguments are and are not. As will become apparent, the State still has not addressed the arguments that Petitioner has actually made.

I. PETITIONER DOES NOT CONTEND THAT RESPONDENT EXCEEDED HIS STATUTORY AUTHORITY; RATHER, PETITIONER CONTENDS THAT RESPONDENT VIOLATED RULE 24.02(d)(4).

As it did at the Court of Appeals, the State continues to argue that Respondent has the authority to determine the conditions of probation pursuant to Section 559.021, RSMo., and Section 559.026 authorizes up to 120 days of shock time as a "condition of probation." The case is as simple as that, so the State contends.

But Petitioner does not (and never has) contended that Respondent exceeded his *statutory* authority. Of course circuit courts have the statutory authority to determine the conditions of probation, including shock time. The point is that, *in this case*, the State and Ms. Delf *had a binding agreement about which statutorily authorized sentence and conditions of probation the Court would impose.* Therefore, to respond by alluding to circuit courts' statutory authority is to miss the point.

Petitioner's contention – which remains unanswered – is that Respondent violated Rule 24.02(d)(4):

> If the court rejects the plea agreement, the court shall, on the record, inform the parties of this fact, advise the defendant personally in open court or, on a showing of good cause, in camera, that the court is not bound by the plea

> agreement, afford the defendant the opportunity to then withdraw defendant's plea if it is based on an agreement pursuant to Rule 24.02(d)1(A), (C), or (D), and advise the defendant that if defendant persists in his guilty plea, the disposition of the case may be less favorable to the defendant than that contemplated by the plea agreement.

Mo. Sup. Ct. R. 24.02(d)(4). As foreshadowed by *Santobello v. New York*, 404 U.S. 257 (1971) and *Schellert v. State*, 569 S.W.2d 735 (Mo. 1978), Rule 24.02(d)(4) is designed to safeguard a defendant's constitutional right to a trial and to assure that a defendant's guilty plea is knowing, intelligent, and voluntary. "For a system of criminal justice strongly to encourage a defendant to believe that a certain sentence will follow the abandonment of his constitutional rights and yet to impose an entirely different sentence seems manifestly unfair and a mockery of justice." 569 S.W.2d at 738 (quoting sources).

Respondent and the State continue to ignore the fact that Ms. Delf was lead to believe that her sentence would not include jail time, and then Respondent sentenced her to 120 days of jail time. This is the precise scenario that Rule 24.02(d)(4) was intended to avoid. And by violating Rule 24.02(d), Respondent rendered Ms. Delf's plea unknowing and unintelligent and deprived her of her constitutional right to a trial.

II. RESPONDENT DID NOT FOLLOW THE PLEA AGREEMENT.

Respondent and the State further contend that Respondent followed the plea agreement, but any fair reading of the plea agreement, the transcript of the Plea Hearing, and the transcript of the Sentencing Hearing plainly demonstrates otherwise. Indeed, avoiding jail time was the whole point of the plea agreement in this case. The State's

first recommendation in this case specifically called for 120 days of shock time. The State's second recommendation was a five-year prison sentence to serve. Then, after an agreement in principle was reached among counsel, the State issued its third recommendation, which was for a 7-year SES and probation, with no mention of jail or prison time. The undersigned even confirmed with the prosecutor that the plea agreement would not include shock time. And Ms. Delf accepted it – precisely because it did not call for jail or prison time. Avoiding jail time was the whole point.

The State is aware of this too. Minutes after the Sentencing Hearing in this case, the prosecutor who authored Respondent's brief candidly acknowledged to the undersigned that it was fully her intention that Ms. Delf would go home after the Sentencing Hearing on probation. In fact, she claimed to be just as surprised by Respondent's imposition of shock time as the undersigned. The State's understanding of the plea agreement in this case was the same as Ms. Delf's and the undersigned's.

The State cites *State v. Williams*, 871 S.W.2d 450, 452 (Mo. 1994) for the proposition that "Probation and its terms are not part of a sentence." But that does not mean that probation and its terms cannot be part of a *plea agreement*, which they were in this case, and which they commonly are in many cases. Furthermore, the issue in *Williams* was whether appellate courts have the power to review the terms and conditions of probation on direct appeal, and this Court held that appellate courts do not. 871 S.W.2d at 452. But this Court further noted that a defendant can seek review via a writ of prohibition or a writ of habeas corpus, *id.* at n. 2, which is what Ms. Delf has done here. Nothing in *Williams* suggests that the State and a defendant cannot negotiate and reach a

binding plea agreement about probation and its terms, and certainly nothing in *Williams* suggests that the State and a defendant cannot negotiate and reach a binding plea agreement about shock time.

III. RESPONDENT'S REASONS FOR IMPOSING SHOCK TIME ARE IRRELEVANT BECAUSE RESPONDENT DID NOT HAVE THE AUTHORITY UNDER THE BINDING PLEA AGREEMENT TO IMPOSE SHOCK TIME.

Although it does not follow Relator's Points Relied On, the State devotes a substantial portion of its brief (pp.10-13) to arguing that the imposition of shock time in this case was appropriate – or at least not an abuse of discretion. The State has even filed a copy of the Sentencing Assessment Report under seal. Such arguments are appropriate at a sentencing hearing when the issue of shock time is being left to the circuit court to decide. But the State ignores the crucial point in this proceeding: Respondent did not have the authority under the terms of the binding plea agreement to impose shock time in this case. Instead, Respondent's authority was to either accept the plea agreement, as stated, or reject it and set the case for trial. To argue that Respondent's modifications to the plea agreement were well founded (or not an abuse of discretion) is to miss the point. Therefore, anything in Ms. Delf's Sentencing Assessment Report or any other comments about the nature of the offense or Ms. Delf's criminal history are irrelevant to this proceeding. If the State thought Ms. Delf deserved 120 days of shock time, it should not have entered a binding plea agreement that called for probation and made no mention of shock time.

IV. PETITIONER DOES NOT ASSERT INEFFECTIVE ASSISTANCE OF COUNSEL.

In a further distortion of Petitioner's position, the State alleges ineffective assistance of defense counsel by the same attorney who has authored Ms. Delf's briefs before this Court. The State intimates that such an argument is a conflict of interest, and the State devotes a substantial portion of its brief (pp.14-16) to refuting this straw man. But no such argument appears in Petitioner's Points Relied On, and Petitioner is not making (and has never made) a claim of ineffective assistance of counsel.

The undersigned did candidly inform this Court (as he did Respondent and the Court of Appeals) that he accurately advised his client of the law regarding plea agreements. Specifically, the undersigned advised Ms. Delf that circuit courts must either follow binding plea agreements or reject them and allow the defendant to stand trial, but circuit courts cannot modify binding plea agreements. Therefore, the undersigned advised Ms. Delf that Respondent could not sentence her to jail time without allowing her to withdraw her plea and stand trial. As a factual matter, that is what the undersigned told Ms. Delf. As a legal matter, that was a correct statement of the law. The undersigned is saying it – not to assert a claim of ineffective assistance of counsel – because it is the truth and because it is an accurate summary of Rule 24.02(d)(4).

If it were otherwise – that is, if a circuit court could impose shock time despite a binding plea agreement that does not call for shock time – the practice of plea negotiations would be transformed throughout the State. There are thousands of binding plea agreements in felony cases in Missouri every year that make no mention of shock

time. If misdemeanors and municipal courts are counted, the number of such binding plea agreements would run into the tens of thousands or more. No defense attorney and no judge ever advises such defendants that they could still receive shock time. Literally never. Attorneys and judges recognize the common-sense notion that avoiding jail time is often the whole point of plea negotiations, so to impose jail time, when a binding plea agreement calls for probation, would constitute a bait and switch.

And make no mistake about the logical conclusion of the State's argument on this point. If the State prevails, prosecutors and defense attorney will no longer be able to make binding agreements concerning the conditions of probation, especially shock time. Any such agreement would be void, as shock time will be the sole province of the sentencing court. Defense attorneys will be required to advise their clients that, regardless of the plea agreement they have negotiated, shock time is still a possibility. And in plea colloquies, courts will give The Delf Advisory:

> Any promise or agreement that you or your attorney may think you have regarding the conditions of probation, and specifically the condition of shock time, is not binding on this Court. It is the sole prerogative of this Court to determine the conditions of probation, and that means the Court can sentence you to up to 120 days of shock time in the county jail – even if you, your attorney, and the State have agreed otherwise. And if the Court does so, you cannot withdraw your plea and stand trial.

Such will become the practice in Missouri if the State prevails in this proceeding. But for the State to suggest now that it was ineffective assistance of counsel for the undersigned not to give The Delf Advisory in this case is not a serious argument – it is an aspersion.

V. CONCLUSION

By "blue penciling" the agreement with 120 days of shock time and a prohibition on working in the home health care industry, Respondent subverted Ms. Delf's reasonable expectations about the meaning of the plea agreement. Accordingly, Relator/Defendant therefore respectfully requests that this Court issue a Writ of Prohibition to compel Respondent to either (1) accept and honor the plea agreement as stated, without any additional terms, or (2) permit Ms. Delf to withdraw her guilty plea and set this case for trial.

Respectfully submitted,

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CERTIFICATE REGARDING LENGTH

I hereby certify that this brief complies with the limitations contained in Rule 84.06(b) in that, not counting the cover, Certificate of Service, this Certificate, signature block, and appendix, it contains 1,801 words, according to the word processing software used to draft it.

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CERTIFICATE OF SERVICE

I hereby certify that on this the 4th day of November, 2016, a true and correct copy of the foregoing was served through the Missouri e-Filing System or via first-class mail to each of the following:

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